U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: MAR 18 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as an elementary special education teacher for At the time she filed the petition, the petitioner taught at Mount Rainier, Maryland. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on May 2, 2012. Accompanying evidence established the petitioner's experience as a teacher in Maryland, North Carolina, and the Philippines, but neither counsel nor the petitioner explained why it would be in the national interest to waive the job offer requirement that normally applies to members of the professions, including special education teachers. Counsel pointed to the petitioner's advanced degree and her length of experience, but neither of those factors qualifies her for the waiver. The advanced degree is, by definition, a fundamental requirement for classification as a member of the professions holding an advanced degree, and ten or more years of experience is a factor in establishing exceptional ability in the sciences, the arts or business (see 8 C.F.R. § 204.5(k)(3)(ii)(B)). Section 203(b)(2)(A) of the Act subjects both of those classifications to the job offer requirement. The national interest waiver is an

additional benefit, over and above the classification sought, and therefore eligibility for the underlying classification does not imply eligibility for the additional benefit of the waiver.

The petitioner submitted copies of various materials relating to her work, including certificates, evaluations and photographs. Similarly, several witness letters show that colleagues, students and administrators hold the petitioner in high regard. These materials demonstrate that the petitioner is a successful teacher, but they do not self-evidently set her apart from other competent and qualified teachers. The materials also do not show that the petitioner's work has or will directly result in significant benefits beyond her own classroom and the local school systems that have employed her.

On July 21, 2012, the director issued a request for evidence. The director acknowledged the petitioner's submission of several certificates and "numerous letters of supports [*sic*] stating what an excellent, dedicated, and helpful teacher she was," but the director found that such evidence does not "demonstrate a past history of achievement with some degree of influence on the field as a whole." The director stated:

> It appears, based on the evidence, that [the petitioner's] impact has been limited to the school at which she is employed in the state of Maryland; therefore, the benefit of her skills have [*sic*] been limited to a small area and not experienced on a national level. The petitioner also has not established that she will serve the national interest.

In response, the petitioner submitted a copy of her master's thesis and various background documents. Counsel stated:

> Since a 'National Special Education Teacher' is not even a real concept but more of metaphysical cognition [*sic*], undersigned wishes to once again posit a realistic proposition upon which to establish that the self-petitioner's contributions will impart national-level benefits.
>
> Even authors of books, treatises and other academic materials on Special Education are not in any standing [*sic*] to claim that their contributions are national in scope since not all special education teachers can be said to utilize their works.

The director did not state that the petitioner had to show that she is "a 'National Special Education Teacher,'" or that "all special education teachers . . . utilize [her] works." National scope is not the same as universal reliance on the petitioner's work.

Counsel stated: "it is but harmless to assert that if an NIW Petition is made with premise on some prevailing Acts of United States Congress, that by itself renders the proposed employment national in scope." This assertion may be "harmless," but it is not persuasive. All employment-based immigrant classifications are based on "prevailing Acts of United States Congress," and so is the statutory job offer requirement. There is no rational basis to conclude that Congress, by mentioning a given occupation in a particular piece of legislation, exempted aliens in that occupation from the job offer requirement.

Counsel quoted remarks made by then-President George H.W. Bush when he signed the Immigration Act of 1990, which created the national interest waiver: "This bill provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with new blood and new ideas." Counsel interprets this passage to mean that Congress created the national interest waiver for educators. The Immigration Act of 1990, however, was not restricted to the creation of the waiver. It was, rather, an overhaul of the entire immigration structure, creating new employment-based immigrant classifications to replace the "third preference" and "sixth preference" classifications previously in place. "[S]cientists and engineers and educators" are all members of the professions who, under the terms dictated by Congress in the Immigration Act of 1990 (as it amended the Act), are all subject to the job offer requirement.

Counsel mentioned other legislation and court cases, all of which affirmed the importance of education but none of which exempted teachers from the job offer requirement at section 203(b)(2)(A) of the Act.

Counsel acknowledged that the job offer/labor certification requirement exists to protect United States workers. Counsel contended that a waiver of that requirement would serve the same ultimate goal, by allowing the petitioner to train "today's students [who] need to be academically competitive to guarantee their employability." This claim assumes the conclusion that counsel meant to prove, specifically, that it is in the national interest for the petitioner, rather than a qualified United States teacher, to be the one teaching those particular students. According to counsel's own statistics, the petitioner's credentials do not readily stand out. Specifically, counsel asserted that "59% [of] special educators in the nation [hold] a Master's degree or equivalent," and "92% [of] special educators [have] full certification." These numbers indicate that nearly three out of five special educators in the United States possess professional credentials comparable to those of the petitioner. Nevertheless, counsel asserted that no two teachers are truly alike, owing to intangible factors that the labor certification process cannot take into account. Counsel then presumed that the petitioner is superior to United States workers in these unquantifiable areas. In effect, counsel declared the petitioner's superiority while also declaring that it would be impossible to measure this superiority, and therefore it would be pointless to try. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel stated that "the business model of the Fortune companies [indicates] that retaining is more cost effective than recruiting new" workers, which "is the most practicable approach in this situation." By statute, eligibility for the waiver does not rest on what is "practicable" or "cost effective," but rather on what will serve the national interest. By counsel's logic, once an alien works in the United States under an employment-based nonimmigrant visa, that alien should never be subject to the job offer requirement because retaining the alien permanently is more "cost effective" and "practicable" than providing employment opportunities to United States workers through the labor certification process. Counsel has speculated at length about Congressional intent with respect to education and foreign workers, but it is an inescapable fact that Congress also created the job offer/labor certification requirement, and therefore presumably intended for it to be used.

Counsel cited a study showing that special education teachers "shift careers" and move to general education, and therefore "[t]he protection afforded for US workers enshrined in the labor certification process will not in any way be jeopardized by grant of waiver in favor of" the petitioner. The statutory standard is that the waiver will serve the national interest, and counsel's observation does not address that standard. Similarly, under the regulation at 8 C.F.R. § 103.3(c), *NYSDOT* is binding precedent on all USCIS employees, and counsel's attempts to set it aside and synthesize an alternative standard from unrelated statutes cannot succeed.

Counsel stated that another teacher received a national interest waiver, and asked that the present petition "be treated in the same light." While AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished service center decisions are not similarly binding. Furthermore, counsel has furnished no evidence to establish that the facts of the instant petition are similar to those in the unpublished decision. Without such evidence, the assertion that both cases merit the same outcome is unwarranted. The only stated similarity is that the beneficiary of the approved petition is "also a teacher in System." Even assuming that the service center correctly approved that petition, the approval does not, in any way, endorse or lend weight to the assertion that teachers are collectively entitled to a blanket waiver of the job offer/labor certification requirement.

The director denied the petition on October 27, 2012, stating once again that the petitioner's "impact has been limited to the schools where she has been employed." The director acknowledged the petitioner's evidence, but found that it did not meet the guidelines set forth in *NYSDOT*.

On appeal, counsel asserts that, at the time of *NYSDOT*'s publication in 1998, there was no "clear-cut Congressional standard" for the national interest waiver. Counsel further contends that, after Congress passed the No Child Left Behind Act (NCLBA) three years later, "[t]here is no longer vagueness or obscurity" on the question of whether "highly qualified teachers" serve the national interest. Counsel, however, identifies no special legislative or regulatory provisions that exempt school teachers from *NYSDOT* or reduce its impact on them.

The assertion that the NCLBA is tantamount to a retraction or modification of *NYSDOT* is not persuasive; that legislation did not amend section 203(b)(2) of the Act. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95 (November 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not made a persuasive claim that the NCLBA indirectly implies a similar legislative change.

Turning to immigration legislation, counsel states:

> With respect to the E21 visa classification, INA § 203(b)(2)(A) provides in relevant part that: "Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the **national . . . educational interests**, . . . of the United States, and

> whose services in the sciences, arts, professions, or business are sought by an employer in the United States."

(Counsel's emphasis.) Counsel, above, highlighted the abridged phrase "national educational interests," but the very same quoted passage also includes the job offer requirement, *i.e.*, the requirement that the alien's "services . . . are sought by an employer in the United States." Counsel has, thus, directly quoted the section of relevant law that supports the director's conclusion. By the plain wording of the statute that counsel quotes on appeal, an alien professional holding an advanced degree is presumptively subject to the job offer requirement, even if that alien "will substantially benefit prospectively the national . . . educational interests . . . of the United States." Neither the Immigration and Nationality Act nor the NCLBA, separately or in combination, create or imply any blanket waiver for teachers, and any attempt to fashion such a waiver out of the wording of the statutes must therefore fail.

Counsel asserted that the director "erred in disregarding evidence demonstrating the national scope of petitioner's proposed benefit through her [*sic*] effective role in serving the national educational interest of closing the achievement gap." Closing that gap is a national goal, but it does not follow that the petitioner's efforts toward that goal are, themselves, national in scope. Counsel did not show that the petitioner's individual work significantly "clos[ed] the achievement gap" outside of her own classroom. Counsel cited statistics showing "that out of the 24 Maryland school districts [redacted] ranked near the bottom" in 2012. By 2012, the petitioner had been working for [redacted] for nearly five years. The district's continued low ranking suggests that, even at the local level, the petitioner's efforts have not resulted in measurable overall improvements; the record does not show that the petitioner has transformed [redacted] into a model for other districts to emulate. Counsel does not explain how the petitioner's future work will "clos[e] the achievement gap" when there is no evidence that her past work has done so to any significant extent.

Counsel repeatedly asserts that the NCLBA requires schools to hire "Highly Qualified Teachers," and that USCIS thwarts this requirement by rigidly enforcing *NYSDOT*. Section 1114(b)(1)(C) of the NCLBA, 20 U.S.C. § 6314(b)(1)(C), dictates that "[a] schoolwide program shall include . . . [i]nstruction by highly qualified teachers." The regulation at 34 C.F.R. § 200.56 defines the term "highly qualified teacher." Counsel did not discuss the regulation or Maryland's state-specific requirements, or cite any evidence to show that the labor certification process does not permit the hiring of "highly qualified teachers." If, by law, a teacher must be "highly qualified" (which is the core of counsel's claim), then a teacher who does not meet the applicable requirements is not "minimally qualified." Rather, such a teacher is underqualified or unqualified. Counsel has not shown that the labor certification process has forced [redacted] or any other Maryland jurisdiction to hire teachers who do not meet the requirements of "highly qualified teachers." Rather, because "highly qualified" is the statutory standard for such teachers, that term appears to be functionally equivalent to the term "minimally qualified" for purposes of labor certification. Counsel submits no evidence to show that the Department of Labor has denied labor certification to teachers with master's degrees; counsel simply speculates that this might occur in the future. Counsel denounces the labor certification process as "tedious," but the national interest waiver is not merely a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *NYSDOT*, 22 I&N Dec. 223.

As is clear from a plain reading of the statute, engaging in a profession (such as teaching) does not presumptively exempt such professionals from the requirement of a job offer based on national interest. Congress has not established any blanket waiver for teachers. Eligibility for the waiver rests not on the basis of the overall importance of a given profession, but rather on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.